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No. 286

In the Supreme Court of the United States

OCTOBER TERM, 1938

THE UNITED STATES OF AMERICA, APPELLANT

v.

MIDSTATE HORTICULTURAL COMPANY, INC., AND ARPAXAT SETRAKIAN

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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The United States District Court for the Eastern District of Pennsylvania, by its judgment made and entered on June 21, 1938, sustained a demurrer to a joint indictment in twenty-six counts charging appellees with soliciting and receiving rebates in violation of the Elkins Act (U. S. C., Title 49, Sec. 41).

Each count of the indictment charges that in the fall of 1932 certain common carriers by railroad, including the Pennsylvania Railroad Company, transported from a point in the State of California

through the Eastern District of Pennsylvania to a point in the State of New Jersey certain property for the appellee Midstate Horticultural Company, Inc.: that the Pennsylvania Railroad Company collected from said Midstate Company the proper transportation charges for the shipment; and that thereafter on May 15, 1935, the appellees, the Midstate Company and Arpaxat Setrakian, its officer and agent, "unlawfully did knowingly solicit, accept, and receive, and cause to be solicited, accepted and received, from said Pennsylvania Railroad Company, a rebate and concession (in specified amount) in respect to the aforesaid transportation * * * whereby said property was transported * * * through the Eastern District of Pennsylvania and within the jurisdiction of this court * * * at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid * * *." The rebates charged by the several counts of the indictment total $10,826.46.

In a bill of particulars ordered by the court the United States stated that one check, to the order of the Midstate Company in payment of all the rebates, was given by the Railroad Company to the appellee Setrakian in the City of New York.

A demurrer was filed to the indictment, and in an opinion filed June 16, 1938, the District Court being "of the opinion that our construction of the case hinges entirely on the question of jurisdi-

tion," held that "if any violation of law occurred as alleged, the case should be tried in New York" and that "jurisdiction is not in this Court, and, so holding, the demurrers are sustained."

On June 21, 1938, the court rendered and entered the following judgment entitled "Order": "AND NOW, to wit: this 21st day of June, A. D. 1938, it is ORDERED that the Demurrer to the Indictment be, and the same is hereby, sustained and defendants discharged without day." From that judgment the United States, on July 20, 1938, petitioned for and was allowed an appeal under the Criminal Appeals Act (U. S. C., Title 18, Sec. 682).

On August 3, 1938, appellees filed in the District Court a statement against jurisdiction, reciting two grounds: (1) that "the appeal was not taken within thirty days after the decision had been rendered by the District Court on June 16, 1938," and (2) that "the decision of the District Court of June 16, 1938, sustaining the demurrer, is not based on the invalidity or construction of the statute upon which the indictment is founded." With the statement against jurisdiction appellees filed a motion to dismiss the appeal on the first ground alone, ignoring the second, and a motion to affirm on the ground that the decision below is "in accordance with the decisions of the Supreme Court."

I

Appellees' first ground making against jurisdiction, and the sole ground relied upon in the motion

to dismiss, is that this appeal was not taken within thirty days "after the decision had been rendered by the District Court on June 16, 1938." Their statement asserts that "The mere entry of the order of June 22, 1938, by the District Court, sustaining the demurrer, does not extend the time within which the appeal must be taken." Their view apparently is that because the opinion filed June 16, 1938, states that "the demurrers are sustained" the opinion and not the order of June 21, 1938, constitutes the lower court's "decision or judgment" within the meaning of the Criminal Appeals Act, and marks the beginning of the thirty-day period for appeals provided by that Act.

The Government's position is that the opinion filed by the lower court on June 16, 1938, is merely a statement of its reasons why the demurrer should be sustained, that the order entered June 21, 1938, is the "decision or judgment" for purposes of appeal, and that, even if the opinion be considered as an appealable "decision", the appeal here from the order or judgment entered June 21 was timely and properly taken because the Act permits an appeal from a decision *or* judgment.

The identical ground upon which appellees rely for the dismissal of this appeal was unsuccessfully urged upon this Court as a ground for dismissing two appeals under the Criminal Appeals Act from the Eastern District of Pennsylvania in *United States* v. *Resnick et al.* and *United States* v. *Acme*

Can Co., 299 U. S. 207; Nos. 62 and 63, Oct. Term, 1936, opinion rendered December 7, 1936. The records before this Court in those cases show that the District Court's opinion filed March 11, 1936, in the *Resnick* case, concluded: "* * * the Demurrer is, therefore, sustained" (R. No. 62, p. 7), and the opinion in the *Acme* case, that: "The demurrer to the indictment is sustained" (R. No. 63, p. 4). An "order sustaining demurrer" was entered April 14, 1936, in each case, reading "Ordered that the Demurrer to the Indictment in the above entitled cause be, and the same is hereby Sustained and the defendants discharged" without day (R. No. 62, p. 7; No. 63, p. 4). From those orders the appeals were allowed on April 14, 1936, thirty-four days after the opinions had been filed. The question whether the appeals were timely taken was argued to this Court by the Government in its brief in opposition to the motions to dismiss and in its main brief, and by the appellees, whose briefs argued at length that since the opinions concluded with the statement that the demurrers were "sustained" they were more than mere opinions and were in effect the judgments of the District Court for appellate purposes.

This Court entertained the appeals and rendered its opinion on the merits, and, although the opinion contains no discussion of the point, it rejects the contention of the appellees not only in necessary effect but also by express words of the last sentence

stating that: "The judgments sustaining the demurrers and discharging the accused must be affirmed." Since, as in the case at bar, the direction or mandate "discharging the accused" was in the orders, and not in the opinions, it is plain that this Court holds that the orders and not the opinions constitute the District Court's "decision or judgment" and mark the beginning of the thirty-day period for appeals under the Criminal Appeals Act.

As the pertinent words of the opinions and orders in those cases are almost identical to those of the opinion and order in the instant case, we submit that the contention of the appellees here is foreclosed by this Court's action and decision in those cases.

That the opinion or paper filed by the District Court in the instant case on June 16, 1938, is not and was not intended by that court as its judgment is clear: it was not entitled an "order" or "judgment" but, instead "Sur Demurrers to Indictments"; it did not discharge the defendants, though it stated that the demurrers were sustained; it was entered by the Clerk not as an order but as "Opinion, Welsh, J., sustaining demurrer"; and that docket entry is followed by the entry "Order of Court sustaining demurrer and discharging defendants filed."

It is equally clear that the order entered June 21, 1938, is and was intended by the court to be its

"decision or judgment" for appellate purposes; the order of June 21 was wholly unnecessary, and, indeed, was a nullity, if, as appellees contend, the paper filed June 16 was both the court's opinion and its judgment; the order is that the demurrer "be, and the same is hereby, sustained and defendants discharged without day," thus, finally terminating the cause in that court; the court's order allowing the appeal recites that the appeal is prayed from the "final judgment of this Court rendered June 21, 1938," and that the appeal "is hereby allowed as prayed."

While it is true that the use of particular words or form of words is not essential to constitute a judgment, and that the test is one of substance and not of form, it is also true that the intention of the court to render judgment must clearly appear. Freeman on Judgments (5th Ed.) I, § 69. The facts and circumstances in these cases clearly negative any intention on the part of the District Court to render judgment by the mere filing of its statement of reasons why the demurrer was sustained. Appellees' view compels the absurd conclusion that the District Court intended to, and did, render two judgments sustaining the demurrer.

A well reasoned opinion precisely in point is that in *Ogata* v. *Ogata*, 30 Hawaii 620 (1928). Section 2509, R. L. Hawaii, 1925, provided that in divorce cases "appeals shall be allowed from all decisions,

judgments, orders, or decrees." The opinion reads (pp. 621–622):

> It has been repeatedly held by this court that appeals under this statute must be taken from the decree and not from the decision (citing cases).
>
> No decree has been entered in the case at bar. While the document signed by the trial judge concludes with the definite statement that "the *libel is dismissed for want of jurisdiction,*" [emphasis supplied] it is obvious that it was intended merely as an opinion of the court—that which ordinarily is called a decision as distinguished from the decree. It is entitled "Decision" and not "Decree." This consideration alone, of course, would not alter the nature of the document, if it were in fact a decree, but it aids in showing the intention of the court. The document is in the ordinary form of an opinion or decision. It sets forth, even though briefly, the reasoning by which the court arrived at its conclusion that it was without jurisdiction to entertain the suit. It contains a citation of authority in support of the view adopted by the court. The mere fact that the concluding statement above quoted is in the form of an order does not render the document a decree. * * * In the present instance, there is no other language approximating that ordinarily used in a decree.
>
> The present appeal, therefore, having been taken solely from the decision and not from the decree, does not lie.

That the court below does not regard such a paper as was filed on June 16, 1938, as a "decision or judgment" is demonstrated by the long-continued practice in that court. Thus, the record before this Court in *United States* v. *Barnow*, 239 U. S. 74 (No. 454, October Term, 1915), discloses that an opinion of the court below was filed March 12, 1915, concluding: "The demurrer to the indictment is sustained." A judgment entry filed April 7, 1915, recited: "It is considered and adjudged that the said Barnow go hence without day * * * and that he be discharged from the said indictment and the premises, unless a writ of error be *taken within 30 days from the entry of this judgment* in accordance with the provisions of an Act of Congress, approved March 2, 1907 (34 Stat. 1246)." [Emphasis supplied.] The records in *United States* v. *Katz et al.*, 271 U. S. 354 (Nos. 726, 727, October Term, 1925) show that the court below allowed an appeal under the Criminal Appeals Act from a judgment entered on July 6, 1923, sixty-eight days after the filing of an opinion April 29, 1925, concluding: "the demurrers are therefore sustained and the indictments quashed." Under similar circumstances in 1936, the court below allowed appeals in the *Resnick* and *Acme* cases, *supra*. In the instant case that court again demonstrated that it considers such a paper as it filed in this case on June 16, 1938, to be a mere opinion and not a judgment, by allowing the appeal on July 20, 1938, from "the final judgment of this court rendered on

June 21, 1938." It would have been the duty of the court below to deny the appeals in all these instances if it construed such papers as that filed in this case on June 16, 1938, as its "decision or judgment. *Mach. Corp.* v. *Vogt Bros. Mfg. Co.*, 267 Fed. 934, aff'd, 267 Fed. 945 (writ of error, certiorari, and mandamus denied, 254 U. S. 607). This established practice and interpretation by the court below of its own papers has the force and effect of a rule of court, and is decisive here. *Fullerton* v. *United States Bank*, 1 Pet. 604, 612; *Duncan* v. *United States*, 7 Pet. 435, 451. *The Semaramis*, 50 F. (2d) 623.

The practice of this Court forecloses appellees' contention. Not only in the *Resnick* and *Acme* cases, *supra*, but in many other cases appealed under the Criminal Appeals Act, has this Court, by assuming jurisdiction, recognized that the phrase "decision or judgment" as used in that Act contemplates the formal order of judgment and not such a paper as was filed by the court below on June 16, 1938, notwithstanding the conclusion of such paper be couched in terms which might also be appropriate in a formal judgment. Illustrative cases, selected at random from the original records of this Court, are cited in the footnote.[1]

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[1] *United States* v. *Bowman*, 260 U. S. 94, No. 69, October Term, 1922. An opinion, filed February 15, 1921, concluded: "Demurrer sustained" (R. 21). An order sustaining the

Even if the paper filed by the District Court on June 16, 1938, be construed as a "decision" within the meaning of the Criminal Appeals Act, nevertheless the appeal here was properly taken from the "judgment" of the court below entered on June 21, 1938. The language of the Act is in the disjunctive, and provides that the appeal shall be taken thirty days after the "decision *or* judgment has been rendered."

For the reasons stated we respectfully submit that the motion to dismiss should be denied.

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demurrer and discharging the defendants from custody was entered on March 25 (R. 21). The writ of error was applied for and granted March 30, forty-three days after the filing of the opinion.

United States v. *Lanzo et al.*, 260 U. S. 377, No. 39, October Term, 1922. Opinion of court filed October 18, 1920, concluded: "The plea to No. 5245 and No. 5568 is sustained" (R. 21, 23). Formal order of dismissal was entered on Jan. 24, 1921 (R. 25, 26), and on February 2 the writ of error was applied for and granted ninety-eight days after the filing of the opinion. This Court reversed the decision of the lower court in that case.

United States v. *Katz and Senn*, 271 U. S. 354, No. 726, October Term, 1925. An opinion, filed April 29, 1925, concluded: "It is concluded that the indictments fail to set forth an indictable offense and the demurrers are therefore sustained and the indictments quashed" (R. 5). A judgment sustaining the demurrer (and ordering nothing further) was entered on July 6, and the writ of error was applied for and allowed on the same day, sixty-eight days after the filing of the opinion.

To the same effect see *United States* v. *Katz and Fenerstein*, 271 U. S. 354, No. 727, October Term, 1925.

II

The second ground recited in appellees' statement making against jurisdiction (but not relied upon as a ground for the motion to dismiss) is that the decision below was not based on the invalidity or construction of Section I of the Elkins Act. This contention is clearly without merit. *United States* v. *Nixon,* 235 U. S. 231, 235–236. Section I of the Elkins Act expressly specifies the courts in which violations of the Act shall be prosecuted. The District Court said in its opinion: "The question is solely one of jurisdiction as to whether or not this is the proper district in which the case should be tried." In view of the lower court's decision and the assignment of errors, the observation of this Court in *United States* v. *Keitel,* 211 U. S. 370, 386, is applicable here:

> * * * if the statutes which the court below construed be given the meaning which the United States by the assignments of error assert is the correct one, an offense against the United States was stated in both counts of the indictment. The construction of the statutes, therefore, is the real question for decision.

III

The question involved is substantial. The construction placed by the District Court upon the jurisdictional provision of Section I of the Elkins

Act is contrary not only to the express language of the Act, but also to the practical interpretation of the Act since the date of its enactment. It is not in accord with the decisions of this Court or of the lower federal courts. *Armour Packing Co.* v. *United States,* 209 U. S. 56, 72–77; *Northern Central Ry. Co.* v. *United States,* 241 Fed. 25, 29 (C. C. A. 2d); *Chicago, St. P., M. & O. Ry. Co. et al.* v. *United States,* 162 Fed. 835 (C. C. A. 8th).

For the reasons stated we respectfully submit that the motion to affirm should be denied.

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